



## **BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION**

### **Advisory Opinion**

**No. 04-009AO**

For one year after leaving County employment, a former employee must not enter into any employment agreement with any person or business if, during the prior three years, the employee significantly participated in any procurement or other contractual activity concerning a contract with that person or business. A former employee asks the Commission to waive this provision to allow the former employee to continue working for a County contractor. We decline to issue the requested waiver because the former employee does not meet the criteria for a waiver under § 19A-8(c).

### **Limitations on the employment of former public employees**

Although the former employee's waiver request presumes that his present employment violates the ethics law's limitations upon the employment of former public employees, that assumption must be examined before analyzing the waiver criteria. Section 19A-13(b) of the ethics law provides:<sup>1</sup>

For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business if the public employee significantly participated during the previous 3 years:

- (1) in regulating the person or business; or
- (2) in any procurement or other contractual activity concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).

Section 19A-13(c) defines the term "significant participation."

Significant participation means making a decision, approval, disapproval, recommendation, rendering of advice, investigation, or similar action taken as an officer or employee. Significant participation ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

A few months after the former employee began work for the County, one of the former employee's subordinates recommended that the County renew its expired contract with a County contractor that provided certain services to County employees. That memorandum went

---

<sup>1</sup> This section of the law applies to the former employee. An uncodified provision of the law states that this section applies to any public employee who left public employment after the effective date of the law—July 11, 2003.

“through” the former employee, and the former employee signed it. The County renewed that contract shortly thereafter.

The former employee resigned from the County and was placed on administrative leave. Some time after that date, the former employee began employment with that County contractor. The County continued the former employee on administrative leave for three more months.

Under this set of facts, we conclude that the former employee significantly participated in a procurement matter involving the County contractor because the former employee made a recommendation regarding contractual activity with that contractor. Thus, the former employee’s continued employment with the County contractor requires a waiver of § 19A-13(b).

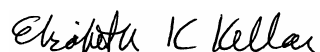
### **Waiver of the ethics law**

Section 19A-8(c) states that, upon written request, the Commission may waive the prohibitions of § 19A-13 if it finds that (1) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees or (2) the proposed employment is not likely to create an actual conflict of interest. Paraphrasing this section of the law, the former employee writes that “failure to grant the requested waiver would reduce the County’s ability to hire or retain highly qualified public employees.” the former employee also writes that the former employee’s employment is not likely to create an actual conflict of interest because the former employee is merely one of over 20,000 employees working for the County contractor. “The combined efforts of hundreds, if not thousands of company employees provide the services [County employees] receive.”

We do not find that the waiver standard is met in this case. Notwithstanding the former employee’s conclusory argument to the contrary, there are no facts to support a finding that failure to grant the waiver might reduce the County’s ability to hire or retain highly qualified employees. There is simply no evidence that the County’s recruitment or retention of employees is diminished if it does not allow those same employees to work in violation of the ethics law.

Neither are we persuaded that the proposed employment is unlikely to create an actual conflict of interest. The conflict issue does not rest upon the nature of the former employee’s work for the County contractor. Thus, the conflict is not averted if the former employee is one of thousands of employees working on the County’s contract. The conflict arises because of the former employee’s actions while a County employee.

FOR THE COMMISSION:



Elizabeth K. Kellar, Chair

December 15, 2004